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EXAMINER

HWANG, VICTOR KENNY

ART UNIT	PAPER NUMBER
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3764

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DATE MAILED: 05/05/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/679,833

Applicant(s)

MICHALOW, DR. ALEX

Examiner

Victor K. Hwang

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

## A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 17 October 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-29 is/are pending in the application.
- 4a) Of the above claim(s) 1-14 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 15-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 05 October 2000 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- 1) ☐ Certified copies of the priority documents have been received.
  - 2) ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - 3) ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 6/8/01 & 12/7/01.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION***Election/Restrictions*

1. Applicant's election with traverse of Group II, claims 15-29 in Paper No. 6, filed October 11, 2003 is acknowledged. The traversal is on the ground(s) that the Examiner's assertion alone that the claimed process can be practiced by another apparatus, or that the apparatus can be used to practice another process is not sufficient to require Applicant's to bear the burden of prosecuting two patent applications for the claimed subject matter, and that a search of the claimed apparatus and claimed method together would not place an undue burden on the Examiner.

This is not found persuasive because Applicant has not indicated any errors in the Restriction Requirement. The inventions are distinct if it can be shown that either: (1) the process as claimed can be practiced by another materially different apparatus or by hand, or (2) the apparatus as claimed can be used to practice another materially different process. MPEP 806.05(e). In this case, the apparatus can at least be used for exercising muscles without sequentially performing acceleration training and stretch-shortening training through sports specific motions. Furthermore, Applicant's claimed apparatus has already presented an undue search burden on the Examiner, since Applicant's claimed apparatus and method could have been further restricted to particular species, such as 3-point stabilization of the wrist joint, elbow joint, shoulder joint, waist, neck, ankle joint, knee joint or hip joint.

The requirement is still deemed proper and is therefore made FINAL.

2. Claims 1-14 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as  
~~being drawn to a nonelected invention, there being no allowable generic or linking claim.~~

Applicant timely traversed the restriction (election) requirement in Paper No. 6, filed October 11, 2003.

### *Drawings*

3. The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the one or more electronic sensors (claim 29) must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

### *Specification*

4. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: the one or more electronic sensors (claim 29) are not disclosed in the body of the specification.

5. The disclosure is objected to because of the following informalities:  
on page 1, the reference to the related application presumably should be updated;

on page 20, line 28, the recitation "90" presumably should be changed to --180--;

on page 21, line 3, the recitation "flexion" presumably should be replaced with --extension--;

on page 21, line 16, the recitation "90" presumably should be replaced with --180--;

on page 21, line 17, the recitation "extension" presumably should be replaced with --flexion--;

on page 23, lines 5-18, the paragraph presumably should be substantially revised to reflect that shown in Figs. 6C and 6D, such as replacing "abdominal" with --back--, "252A" with --252C--, "254A" with --254C--, "256A" with --256C--, "258A" with --258C--, and "250A" with --250C--;

on page 26, line 9, "cylincer" presumably should be changed to --cylinder--; and

on page 26, line 13, "waste" presumably should be changed to --waist--.

Appropriate correction is required.

### ***Claim Objections***

6. Claims 25 and 26 are objected to because of the following informalities: on line 2 of each claim, "mechanism" presumably should be changed to --device-- to provide proper antecedent basis. Appropriate correction is required.

### ***Double Patenting***

7. A rejection based on double patenting of the "same invention" type finds its support in the language of 35 U.S.C. 101 which states that "whoever invents or discovers any new and useful process ... may obtain a patent therefor ..." (Emphasis added). Thus, the term "same

invention," in this context, means an invention drawn to identical subject matter. See *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1894); *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957); and *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

A statutory type (35 U.S.C. 101) double patenting rejection can be overcome by canceling or amending the conflicting claims so they are no longer coextensive in scope. The filing of a terminal disclaimer cannot overcome a double patenting rejection based upon 35 U.S.C. 101.

8. Claims 15-29 are rejected under 35 U.S.C. 101 as claiming the same invention as that of claims 13-25 of prior U.S. Patent No. 6,666,801 B1. This is a double patenting rejection.

9. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

10. Claims 15-29 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-28 of U.S. Patent No. 6,482,128 B1. Although the conflicting claims are not identical, they are not patentably distinct from each other because the training method uses training devices that read upon the claimed training apparatus.

11. Claims 15-29 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-14 of copending Application No. 10/277,074. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claimed training apparatus of the instant application is disclosed in the claims of the copending application as the horizontal component training device.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 15-19 and 23-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wiemann et al.* (WO 95/22377) in view of *Eckler* (US Pat. 5,011,142). *Wiemann et al.* discloses a training apparatus for athletes comprising a three point stabilization system adapted to isolate and stabilize portions of the athlete's body on both sides of the hip joint. An actuator 20 or 30 has an axis of rotation 11 or 21 centered at an axis of rotation of the hip joint. A first contact point on the actuator 20,30 is adapted to engage with a portion of the athlete's body distal to the axis of rotation of the joint. A second contact point 60 is adapted to engage with a

portion of the athlete's body at or near the axis of rotation of the joint and on the opposite side of the athlete's body as the first contact point. A third contact point 40 is adapted to engage with a portion of the athlete's body proximal the axis of rotation of the joint and on the same side as the first contact point. All three contact points are adjustable relative to the axis of rotation of the actuator. A pair of weight stack resistance devices 50 are operatively coupled to the actuator to provide isotonic, concentric and eccentric resistance to the athlete's muscles.

*Wiemann et al.* does not disclose that the exercise resistance comprises a first resistance adapted to perform acceleration training (claim 15) and a second resistance device adapted to perform stretch-shortening cycle training (claim 15). *Wiemann et al.* discloses a single set of weights for performing both types of training, the weights providing isotonic concentric and eccentric resistance. *Wiemann et al.* also does not disclose the first resistance device is hydraulic (claim 16); the first resistance device is circular hydraulic (claim 17); the first and second resistance devices coupled to the actuator simultaneously (claim 19); the first resistance device providing concentric resistance (claim 25); the second device providing eccentric resistance (claim 26); and the first and second resistance devices comprise discrete resistance devices (claim 27).

*Eckler* discloses an exercise control system for an exercise machine (Fig. 6) to allow the exercise machine to operate in either isokinetic or isodynamic modes (Abstract). An isodynamic mode is one where there is a combination of isotonic and isokinetic resistances (col. 1, lines 22-49). The system comprises a first, hydraulic resistance device 104 and a second, isotonic resistance device 88. The hydraulic resistance device primarily provides the isokinetic resistance during concentric muscle contraction. The second resistance device



provides isotonic resistance during concentric and eccentric muscle contraction. The first and second resistance devices are discrete resistance devices and are coupled to the actuator simultaneously. The system may include electronic controls to monitor and adjust settings on the system for desired results. Hydraulic cylinders may be used that do not require electric lines from external sources for operation of the system. Rotary cylinders may also be used in the system.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the isotonic training apparatus of *Wiemann et al.* with the exercise control system of *Eckler*, in order to allow the training apparatus to operate in either isokinetic or isodynamic or isotonic modes, to provide resistance important for the development of peak forces leading to peak strength production (col. 5, lines 14-22).

14. Claims 20-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Wiemann et al.* (WO 95/22377) as modified by *Eckler* (US Pat. 5,011,142) as applied to claim 15 above, and further in view of *Elmeskog* (US Pat. 4,333,340). *Wiemann et al.* as modified by *Eckler* describes the invention as claimed except for the apparatus comprising a stabilizing harness (claim 20); the stabilizing harness comprising one or more shoulder straps (claim 21); and the stabilizing harness comprising one or more waist straps (claim 22).

*Elmeskog* discloses a training apparatus having a stabilization system comprising a stabilizing harness 28 having a shoulder strap and a waist strap for securing the position of the user within the apparatus.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the stabilizing system of *Wiemann et al.* as modified by *Eckler* with the stabilizing harness of *Elmeskog*, in order to further secure an athlete within the apparatus and prevent undesired movement during training.

### Conclusion

15. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

*Cuinier* (US Pat. 3,495,824) discloses a circular hydraulic device.

*Andrews* (US Pat. 3,587,319) discloses the equivalence of elongate hydraulic cylinders and circular hydraulic cylinders.


*MacMillan* (US Pat. 4,765,611), *Telle* (US Pat. 5,344,374) and *Rasmussen* (US Pat. 6,482,134 B1) discloses exercise apparatus comprising a weight resistance device and a hydraulic resistance device.

*Webber* (US Pat. 5,733,233) discloses a common three point stabilization system.

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Victor K. Hwang whose telephone number is (703) 308-2865. The examiner can normally be reached Monday through Friday from 7:30 AM to 4:00 PM Eastern time. The facsimile number for submitting papers directly to the examiner for informal correspondence is (703) 746-4891. The facsimile number for submitting all formal correspondence is (703) 872-9306.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Technology Center 3700 receptionist at (703) 308-0858.

Victor K. Hwang  
April 23, 2004

  
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